IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1651

SEATRAIN SHIPBUILDING CORPORATION

AND

POLK TANKER CORPORATION

Petitioners,

v.

SHELL OIL COMPANY, *et al.*

Respondents.

BRIEF OF SHELL OIL COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Does the Secretary of Commerce have authority to waive permanently restrictions required by the Merchant Marine Act, 1936, as amended, against use in domestic trade of a vessel built with construction-differential subsidy when the Act not only requires such vessels to engage exclusively in foreign trade but expressly limits the Secretary's authority to waive domestic trade restrictions to periods of no more than six months in any year?

STATEMENT OF THE CASE

This case presents the second instance in fifteen years in which a vessel which had received construction differential subsidy has actually entered the domestic trade by reason of a purported waiver by the Secretary of Commerce, and the first instance since the Merchant Marine Act in 1936 in which the vessel had been built with construction differential subsidy. It arose in the following manner.

By letter dated August 31, 1977, defendant Robert J. Blackwell, Assistant Secretary of Commerce for Maritime Affairs ("Assistant Secretary") and defendants Howard F. Casey and Samuel B. Nemirow, members of the Maritime Subsidy Board ("MSB") ruled that the T.T. STUYVESANT ("STUYVESANT"), a 225,000 deadweight ton ("dwt") oil tanker could be operated in the domestic trade without limitation, provided that construction differential subsidy ("CDS") be repaid over 20 years. The Assistant Secretary and MSB members took these actions as delegatees of defendant Juanita M. Kreps, Secretary of Commerce ("Secretary").

Prior to defendants' actions, the STUYVESANT was barred from domestic trade because it was built with the aid of CDS. By statute, CDS may be paid only for the

construction of vessels to be used in the United States foreign trade, and owners of vessels built with CDS must agree to restrict trade activity accordingly. Merchant Marine Act, 1936, §§ 501, 506, 46 U.S.C. §§ 1151, 1156. The funds represent the approximate cost differential between building a ship in the United States and abroad, thus compensating for the competitive advantage enjoyed by foreign-built vessels. Merchant Marine Act, 1936, § 502, 46 U.S.C. § 1152. Since United States domestic trade is restricted to vessels built in the United States, no CDS is necessary or available for vessels engaging in this trade. Merchant Marine Act, 1920 ("Jones Act") § 27, 46 U.S.C. § 883.

The CDS funds were paid pursuant to an agreement of June 20, 1972, between MSB and Seatrain Shipbuilding Corporation ("Seatrain"), the builder of the STUYVESANT. On the same date, Polk Tanker Corporation ("Polk"), as the vessel purchaser, agreed to operate the STUYVESANT exclusively in the United States foreign trade. Polk and Seatrain were building the STUYVESANT on speculation. No potential charterer was committed to the vessel in 1972.

On July 8, 1977, as the vessel neared completion, Polk filed with MSB a request that the domestic trade restrictions of sections 501 and 506 be waived with respect to the STUYVESANT for a period of three years, provided a pro rata portion of CDS was repaid. The request stated that if a waiver were granted, the STUYVESANT would be chartered to the SOHIO Petroleum Corporation ("SOHIO") for use in the Alaska oil trade. The sole statutory authority for the waiver alleged in the request was section 207 of the Act, 46 U.S.C. § 1117.

The MSB, by published notice, opened Docket S-565 for the Polk request and invited public comment. 42 Fed. Reg. 37229 (1977). At that time, Shell Oil Company

("Shell") was the purchaser under a construction contract entered into on February 28, 1975 of two 188,500 dwt San Diego Class Tankers being constructed by National Steel and Shipbuilding Company, San Diego, California ("NASSCO"). Both vessels were to be built without government subsidies or financing aids. The approximate cost of each vessel was to be $92,000,000. The first vessel was scheduled for delivery in early 1978 and the second vessel in September, 1978.[1] On August 8, 1977, Shell among others filed comments indicating that the Polk request was beyond the lawful authority of the MSB and that Shell's interests could be seriously harmed if the request were granted.

On August 25, 1977, in correspondence not served on Shell or any other party to Docket S-565, Polk requested a permanent waiver for the STUYVESANT, coupled with a repayment of CDS over twenty years. As before, if the waiver were granted, the vessel would be chartered to SOHIO for three years. Polk withdrew the prior request for a three year waiver on August 26, 1977. MSB, in the letters of August 31, informed Polk that the August 25 request would be granted. The letters were, like the request, not served on Shell or published in the Federal Register.

Following issuance of the August 31 letters, a closing transaction at which the STUYVESANT would be sold and the new Title XI guaranteed bonds would be issued was scheduled for September 23, 1977. On September 12, 1977, Shell filed a request for review by the Secretary of Commerce. On September 22, 1977, no response having been heard from the Secretary, Shell filed a civil action in the United States District Court for the District of Columbia seeking review of the August 31 actions. The same

[1] The first vessel was delivered on March 14, 1978. The second vessel was delivered on October 25, 1978.

day, Judge Oliver Gasch of the United States District Court temporarily restrained the Board and Assistant Secretary from participating in the closing. *Shell Oil Co. v. Kreps*, No. 77-1645 (Temporary Restraining Order) (D.D.C. Sept. 22, 1977). The restraining order was dissolved by Judge Charles R. Richey on September 30, 1977. Judge Richey stated that Shell would not suffer irreparable harm until the first NASSCO vessel was delivered. *Shell Oil Co. v. Kreps*, No. 77-1645 (Findings of Fact and Conclusions of Law) (D.D.C. Sept. 30, 1977).

In an order and memorandum opinion of November 22, 1977, adjudicating cross-motions for summary judgment, the District Court held that the Secretary had authority to waive trading restrictions and to accept promissory notes but could only take such action insofar as it did not result in unfair competition to the unsubsidized fleet. Because the Secretary did not consider the competitive effects of the August 31 actions, the court held the actions to be arbitrary and capricious under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A). The court remanded the matter to the agency for consideration of competitive effects.[2] *Shell Oil Co. v. Kreps*, 445 F. Supp. 1128 (D.D.C. 1977) (App. A at 65a-95a).[3]

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[2] On January 6, 1978, the MSB, after receiving written submissions on the question of competitive effect and denying Shell's request for a trial-type hearing, concluded that the August 31, 1977 actions were valid. *T. T. STUYVESANT—Repayment of CDS, Operations in Jones Act Trade*, MSB Docket No. A-124 (Final Opinion and Order on Reconsideration) (Maritime Administration, U.S. Dept. of Comm. 1978). Shell timely requested Secretarial review of the MSB Order, but such review was declined. On October 14, 1978, Shell filed in United States District Court a complaint challenging the validity of the MSB Order. Following the Court of Appeals decision in the proceeding now before this Court, the October 14 action was dismissed without prejudice.

[3] Citations to "App. A" refer to Appendix A of the Petition for Certiorari.

The United States Court of Appeals for the District of Columbia Circuit reversed the District Court on February 6, 1979. The panel majority held that the Secretary had no authority to waive permanently trading restrictions on vessels built with CDS. *Alaska Bulk Carriers, Inc. v. Kreps*, ____ F.2d ____ (D.C. Cir. 1979) (App. A at 1a-51a). On March 22, 1979, the full court denied appellees' suggestions for rehearing *en banc*, with only one judge noting a dissent. (App. A at 63a-64a).

Shell caused the two NASSCO vessels to be built for the purpose of engaging in the Alaska oil trade. Prior to executing the construction contracts, Shell projected that either the ships would be needed by Shell to transport Alaskan crude to its own refineries or that, due to a shortfall in available unsubsidized vessel tonnage, other oil companies owning Alaskan crude would need the vessels. There is no trade other than the Alaska oil trade in which the vessels can economically be used. In other domestic trades, there is no demand for oil tankers of the size of the NASSCO vessels. The vessels cannot be used economically in the foreign trade because they were not built with subsidy.

The first NASSCO vessel was, upon delivery, chartered for two years to SOHIO. The two year period ends in March, 1980. At SOHIO's option, the contract may be extended for an additional 12 months. This option must be exercised no later than six months before the termination of the original term, or October, 1979. The second NASSCO vessel was also chartered to SOHIO upon delivery. This contract expires in October, 1981.

On March 28, 1979, Seatrain and Polk moved the Court of Appeals for a stay of mandate pending application to this Court for a writ of certiorari. On April 4, 1979, Shell objected to the stay and particularly to a stay in excess of seven days on the ground that a delay in the

filing of a petition for writ of certiorari until the allowable due date would prevent this Court from ruling on the petition until the next Term. Such delay, in turn, would have seriously prejudiced Shell, since it would have allowed the STUYVESANT to continue in the Alaska oil trade through the time the SOHIO option to renew must be exercised and negotiated.

On April 19, 1979, the Court of Appeals granted a stay of mandate pending application for writ of certiorari limited to May 1, 1979.

THE WRIT SHOULD NOT BE GRANTED

This case does not present an issue worthy of review by this Court. Although the narrow legal question decided below is one of first impression, its resolution depends on the simple application of long established doctrines of statutory construction. Judge Wilkey's well-reasoned, exhaustive opinion more than adequately settles the matter and should not be disturbed.

Moreover, the decision will have but a minimal impact on the interests of the United States. With respect to general maritime policy, the question involved in this case has arisen but one other time in the entire history of the Merchant Marine Act, 1936. With respect to the specific transaction involved here, the decision will have little impact on the United States' financial interests.

A. The Court of Appeals Correctly Held That the Secretary Has No Authority To Waive Permanently Trading Restrictions on Vessels Built with CDS.

This case can be easily decided by simply reading the Merchant Marine Act, 1936, ("the Act") as written and applying traditional rules of statutory construction. As petitioners concede, no provision of the Merchant Marine

Act, 1936, expressly authorizes the Secretary to waive permanently trading restrictions on vessels built with CDS. *See Petition For a Writ of Certiorari To the United States Court of Appeals For the District of Columbia Circuit* ("Seatrain Petition"), at 12. The sole provision in the Act dealing with the subject of waivers is section 506. 46 U.S.C. § 1156. This provision creates an exception to the general rule restricting vessels built with CDS to foreign trade by authorizing the Secretary to waive the restrictions for a maximum of six months in any one year. Fundamental precepts of statutory construction— recognized by the Court of Appeals—dictate that courts not create by implication exceptions to statutory requirements when Congress itself expressly enumerates one or more exceptions. *Alaska Bulk Carriers, Inc. v. Kreps*, ____ F.2d at ____ (App. A at 15a-16a). The conclusion, thus, is inescapable that the Act nowhere authorizes permanent waivers and that section 506 prohibits them.

Any doubt that the Act prohibits permanent waivers is resolved by the legislative history of section 506. The initial proposals for the Act and the first drafts of section 506 clearly provided for permanent waivers upon full repayment of subsidy. The version of section 506 enacted in 1936 was ambiguous on the subject, although certain language appeared to authorize permanent waivers. In 1938, the only language arguably permitting permanent waivers was deleted, never to return. The statements of Maritime Commission Chairman Kennedy, who proposed the amendment, and the legislative reports accompanying the amendment make clear that the section was rewritten precisely to remove all ambiguities with respect to permanent waivers. This history teaches two lessons. One, section 506 was, from the outset, intended to describe all, not just some, instances of permissible waivers. Two, section 506 intentionally excludes permanent waivers from the category of permissible waivers.

The entire matter is summarized with great facility by the Court of Appeals:

> No one in the present case . . . now contends that § 506, as amended, authorizes permanent waivers. The trial court specifically so stated, and looked elsewhere in the statute for inherent authority in the Secretary to do this. However, the 1936 version of § 506 is the *only* provision which any party to this case has ever cited as providing direct authority for permanent waivers. That language is now *gone*, by specific direction of Congress. We cannot believe that by deleting the only language in § 506 which could be argued to permit permanent waivers, and by leaving only language permitting temporary waivers, Congress thereby manifested an intention that the Agency should have *express* authority to issue *temporary* waivers under § 506 and *implied* authority to issue *permanent* waivers, pursuant not to § 506 but to some unexpressed inherent power conferred in other sections of the Merchant Marine Act of 1936.
>
> As we read the legislative history, both permanent and temporary waiver provisions were considered both in 1936 and in 1938 by the Congress, and Congress in 1938 determined, on the recommendation of the Maritime Commission, to permit the Agency to grant only temporary waivers. This deliberate Congressional intent, pursuant to a carefully constructed policy to maintain separate subsidized and unsubsidized fleets, cannot be ignored by the Agency and the court on some vague notion of inherent power elsewhere, which it now might be convenient to utilize.

Alaska Bulk Carriers, Inc. v. Kreps, ____ F.2d at ____ (App. A at 28a-29a) (emphasis in original; footnotes omitted).

Not only is the Court of Appeals' opinion supported by the language of the Act and its legislative history, but sound maritime policy requires the prohibition of permanent waivers as well. The Court of Appeals recognized—and properly so—that the Secretary is simply incapable of making judgments crucial to the intelligent exercise of the discretion she seeks in this case. The Secretary, by her own admission, cannot assess the competitive impact a new vessel will have on the domestic trade for more than three years. Once restrictions are waived, however, the vessel is free to ply the domestic trade for its full 20 year useful life. The unknown consequences of this new and previously unanticipated competitive entry speak strongly against permanent waivers. *See Alaska Bulk Carriers, Inc. v. Kreps*, ____ F.2d at ____ (App. A at 16a-19a).

More importantly, the permanent waiver of trading restrictions on vessels built with CDS, even with full repayment of subsidy, can only disrupt the free market mechanism so carefully preserved for the domestic trade by the Jones Act and by section 506. Persons deciding to construct ships without CDS must be able to assess future demand and supply in that market. If ships supposedly limited to foreign trade can enter the domestic market whenever economic conditions make it desirable for them, future tonnage supply will be impossible to assess. Under these conditions, no capital will be invested in unsubsidized vessels.

Once built with CDS, a vessel takes its defined place in the supply and demand schedule of foreign trade potential, but it is simultaneously removed from the domestic trade inventory. The entire economics of the unsubsidized

fleet is built on this principle. *See Alaska Bulk Carriers, Inc. v. Kreps*, ____ F.2d at ____ (App. A at 49a-51a).

Petitioners' contention that competition from subsidized vessels operating under temporary waivers upsets market projections in the same manner as permanent waivers is plainly incorrect. *See Seatrain Petition*, at 24. Six month waivers are awarded only after the Secretary determines that all subsidized vessels are employed and that additional tonnage is required. 46 C.F.R. Part 250. Thus, the six month waiver provision affords the Secretary the flexibility to prevent shortages of tanker supply in the domestic trade, while adequately protecting the unsubsidized fleet. Permanent waivers afford neither flexibility nor protection.

By the same token, respondent is not, as petitioners contend, reaping a windfall. Anyone, including petitioners, could have built unsubsidized vessels for use in the Alaska oil trade. Respondent should not be penalized for having the good judgment to have done so while others, including petitioners, did not. Petitioners should not be rewarded for having made the opposite judgment.

As stated at the outset, when the language of the Act and its history are accepted at face value, the proper result in this case is easily determined. This case is made difficult, and the briefs and court opinions are made thick, only by the inventive theories created by petitioners and the Secretary to escape the obvious prohibition against permanent waivers. These theories, while creative and, at times, beguiling, are hopelessly flawed. The Court of Appeals painstakingly laid each of them to rest. There they should remain.

B. The Court of Appeals' Decision Will Have Only a Minimal Impact.

Petitioners' contention that the Court of Appeals' decision will have an immediate adverse impact on the United States Treasury cannot withstand close scrutiny. *See Seatrain Petition*, at 11. Petitioners correctly observe that the government will not receive repayment of CDS if the Court of Appeals' decision stands. However, CDS is not a loan, but an outright award. The United States never expected to have this money returned. Its nonreturn cannot be of great consequence.

Petitioners' contention that $60 million of loans and guarantees extended by the Department of Commerce and secured by the STUYVESANT would be placed in jeopardy is wholly without basis. First, Seatrain Lines, Inc., the parent corporation of petitioners, has unconditionally guaranteed to pay these loans if necessary. Seatrain Lines, Inc. is a widely held corporation with substantial assets. There is nothing in the record which suggests that it could not meet its obligations. Second, the vessel itself, valued at $100 million by petitioners, could be foreclosed on by the United States to recoup its losses on the loans and guarantees. Third, $28 million of the $60 million at issue was borrowed to repay previous loans to the Seatrain shipyard by the Department of Commerce. On May 8, 1979, the shipyard announced that it was closing due to perpetual losses. N.Y. Times, May 9, 1979, at A1. col. 2. Thus, the likelihood that the United States would ever have recovered those funds is not great. Finally, the STUYVESANT has employment only through 1980. There is no guarantee that the vessel would not, at that time, become idle, thereby triggering the same chain of events petitioners attribute to the Court of Appeals' decision.

Petitioners' contention that the STUYVESANT would be forced into layup is meaningless. Since these proceedings first began, subsidized American tankers have been in layup. Several have had pending applications for six month waivers. If the STUYVESANT has employment in the domestic trade, it is at the expense of these vessels if not at the expense of unsubsidized vessels which it directly displaced from the trade.

Petitioners' contentions with respect to the more general consequences of the decisions on maritime policy are also incorrect. As noted above, the Court of Appeals' decision furthers the purposes of the Merchant Marine Act, 1936 and the Jones Act. Moreover, prior to Polk's waiver request, a subsidized vessel had entered the domestic trade pursuant to a permanent waiver only once, in 1964. The denial of a power the Secretary exercises so infrequently could hardly be considered a crippling blow to American maritime policy.

CONCLUSION

The opinion of the Court of Appeals is correct in all respects and entirely unremarkable. The petition for a writ of certiorari should be denied. Respondent earnestly hopes the Court will be able to act on the petition before the expiration of the Term, just as the Court of Appeals limited the stay pending application for the writ to May 1.

Respectfully submitted,

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